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No. 81-1018

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

OFFICERS WILLIAM J. VORBECK, ROY L. PERKINS, GOERGE RATTERMAN, WALTER OTTEN, GARY PERKINS, JOSEPH BRASSER, and THE ST. LOUIS POLICE ASSOCIATION, a Not for Profit Organization,

Petitioners,

v.

HOMER E. SAYAD, THOMAS W. PURCELL, CHARLES VALIER, ROBERT F. WINDERSMITH and VINCENT C. SCHOEMEHL, JR., as the Board of Commissioners of the St. Louis Metropolitan Police Department,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

KLUTHO, CODY AND KILO
ATTORNEYS, INC.
EDWARD C. CODY,
CHARLES W. KUNDERER,
1000 Oakview Place
St. Louis, MO 63110
(314) 647-8910

MARK H. NEILL
1200 Clark Street
St. Louis, MO 63103
(314) 444-5609

Attorneys for Respondents

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition.

REGULATION INVOLVED

The ten challenged rules of the St. Louis *Police Manual* are summarized at pp. A2 and A3 of the Appendix to the Petition.

QUESTIONS PRESENTED

Whether chalienges on constitutional grounds to ten internal disciplinary rules of a major metropolitan police department present an actual, justiciable controversy in the absence of concrete factual instances of their enforcement referable to Plaintiff police officers or their Association.

OPINIONS BELOW

The judgment of the District Court is reported at 498 F.Supp. 158. The opinion of the Court of Appeals for the eighth Circuit, not yet reported, is appended to the Petition (A-1).

STATEMENT

Respondents disagree with the Petitioners' summary of the reasoning of the Eighth Circuit Court of Appeals stated in Petitioners' Statement.

The following supplement is submitted.

This litigation concerns multiple constitutional challenges raised by seven members of the St. Louis Metropolitan Police Department and their Police Association to multiple provisions of the internal disciplinary rules adopted by the Board of Commissioners of the St. Louis Metropolitan Police Department. Ten rules were ultimately submitted to the United States District Court for the Eastern District of Missouri and the United States Court of Appeals for the Eighth Circuit.

The District Court Trial on the mertis was not a class action; two of the three officers who testified had retired prior to the District Court proceeding. Neither of the two named Plaintiffs who testified presented evidence that the challenged rules had been applied in a concrete factual situation adversely to himself. One of the officers who testified, Officer Vorbeck, was dismissed at the close of Plaintiff's case. The Association suffered no detriment or injury, concrete or abstract.

The Eighth Circuit decision rejected the abstract challenge to the ten rules remaining under challenge, holding a federal court has no jurisdiction to issue a judgment not involving an actual controversy between adverse parties in an adversary proceeding.

Circuit Judge Arnold, concurring, wrote he would have affirmed the judgment of the District Court dismissing on its merits the claim of facial unconstitutionality on the present record.

ARGUMENT

I

The Decision Below Is Clearly Correct.

The evidence upon the record failed to establish an actual controversy between adverse parties in an adversary proceeding; accordingly, the decision of the Eighth Circuit Court of Appeals is clearly correct.

Petitioners cite *Doe* v. *Boulton*, 410 U.S. 179, in which Plaintiff, a woman, was denied an abortion under Georgia statutes. *Boulton* is clearly distinguishable in that the Georgia anti-abortion statute had prevented Doe from obtaining an abortion.

None of the named Vorbeck Plaintiffs, however, testified he had been concretely denied the exercise of a constitutionally protected right pursuant to any of the ten rules remaining under challenge. The retirements of Officers Vorbeck and Dotson preclude future application of the challenged rules to them. Only Plaintiff Roy Perkins remained subject to the rules; his testimony contending he had been inconvenienced by the rules was not substantially credible. Neither did he testify that he had been deterred from any action under the regulations. The Court below noted that it was not dealing with the public at large, but with a duly constituted police force that is para-military in nature. Referring to *Kelly* v. *Johnson*, 425 U.S. 2247, the Court reiterated:

> "The promotion of safety of persons and property is unquestionably at the core of the State's police power, and virtually all state and local governments employ a uniformed police force to aid in the accomplishment of that purpose. Choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are State

choices designed to promote other aims within the cognizance of the State's police power." (A-13)

The Court stated:

"Again, we recognize that the regulations at issue here are cast in broad terms. We also recognize that such breadth may lend itself to excesses in arbitrariness in enforcement, but assume that these regulations will, as a matter of legitimate governmental interest, be made more specific in their individual application to concrete situations and thus be substantially limited in their administration. No excesses have been demonstrated here. No case or controversy had been pleaded. Therefore, we affirm the judgment of the District Court dismissing the action for the reasons stated herein." (A-13)

The Respondents submit that Petitioners seek the Court to issue an advisory opinion having the effect of directing a general rewriting of the internal disciplinary rules of the St. Louis Metropolitan Police Department. Petitioners, however, adduced no evidence of any defined activities in which they desire to engage nor concrete factual incidents of enforcement as framework for such a decision and accordingly, the decision of the Court below is clearly correct.

II

No Important Question Of Federal Law Is Presented.

In deciding whether a "controversy" had been presetned, the Court below did not apply a strict or arbitrary test for determining there was no "actual controversy" presented on the record. Citing *Golden* v. *Zwickler,* 394 U.S. 103, 108 (1969) the Court applied the following test.

"The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act

> is necessarily one of degree, and it would be difficult if not impossible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged under all the circumstances show there is a substantial controversy between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a Declaratory Judgment." (Citations omitted).

Since the decision below determined upon the facts in the record in the District Court, that this case did not present a "substantial controversy", there is no reason to think that the case involves any question of federal law of precedential significance.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Edward C. Cody,
Charles W. Kunderer;
and Mark H. Neill
Counsel for Respondents